MUHAMMAD HILMAN IDHAM & ORS A

v.

KERAJAAN MALAYSIA & ORS (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR B
AZIAH ALI J
[ORIGINATING SUMMONS NO: R1-24-47-2010]
13 OCTOBER 2010

CIVIL PROCEDURE: *Costs - Review of costs - Whether special grounds existed - Whether court has power to reconsider and amend its order on costs - Whether court functus officio* C

CIVIL PROCEDURE: *Injunction - Erinford injunction - Application for - Declaratory judgment - Whether court had jurisdiction to grant injunction - Whether reliance made to para. 1 of the Schedule to the Courts of Judicature Act 1964 ('para 1') - Whether Erinford injunction came within words "or any others" in para. 1 - Takako Sakao v. Ng Pek Yuen & Anor (No 3)* D

The plaintiffs filed an originating summons *vide* encl. 1 seeking for, *inter alia*, a certain declaration in relation to s. 15(5)(a) of the Universities and University Colleges Act 1971 ('the Act'). Pending the disposal of E
encl. 1, the plaintiffs applied *vide* encl. 4 for an interim injunction to restrain the third defendant from proceeding with the disciplinary action brought against the plaintiffs based on the offence committed by them in relation to s. 15(5)(a) of the Act. However, the court dismissed both encls. 1 and 4 with costs. An appeal was then filed against the decision. F
Pursuant to this, the plaintiffs made an application for the grant of an Erinford injunction pending the appeal. One of the grounds relied for this application was that the court had jurisdiction to grant the said injunction under para. 1 of the Schedule to the Courts of Judicature Act 1964 ('para. 1'). The issues that arose for consideration were: (i) whether the G
court could allow the plaintiffs' application; and (ii) whether the court was *functus officio* to review the order on costs.

Held (dismissing plaintiffs' application):

(1) A declaratory judgment makes no positive order and cannot be H
enforced by execution. There can be no committal or other execution process issued to enforce a declaration. Hence, a stay of a declaratory judgment does not arise; *Takako Sakao v. Ng Pek Yuen & Anor (No 3)* (foll). (para 8)

(2) An application for any relief specified in para. 1 of the Schedule I
must be made under O. 53 of the Rules of the High Court 1980. Paragraph 1 specifically states 'prerogative writs' and in interpreting

A para. 1, the intention of the provision as a whole must be looked at. Where general words follow particular and specific words of one genus, the presumption is that the general words are restricted to the same genus as the preceding particular words unless it can be shown that a wider sense is intended. (paras 11 & 13)

B **(3)** An Erinford injunction is not of the same genus as "*habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*" and the *ejusdem generis* principle does not apply. The Erinford injunction does not come within the words "or any others" in para 1. Hence, para. 1 ought not to be interpreted as conferring jurisdiction on the court C to grant an Erinford injunction. (para 12)

(4) In relation to the issue of costs regarding encls. 1 and 4, the grounds that this is a public interest case which involved a novel point and the plaintiffs were students are insufficient grounds to D constitute special grounds to depart from the general principle that the successful party is entitled to be paid his costs. Hence, this court exercised its discretion and ordered costs to the defendants to be taxed unless otherwise agreed. Further, the court had no power to reconsider and amend its order on costs since it was *functus officio*. (paras 17 & 18) E

Case(s) referred to:

Marina Mohd Yusoff v. Pekeliling Triangle Sdn Bhd & Other Appeals [2008] 1 CLJ 169 CA ***(refd)***

Merdeka University Berhad v. Government of Malaysia [1982] 1 LNS 1 FC ***(refd)***

F *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC* ***(refd)***

Petroliam Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew [1986] 1 LNS 81 SC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor (No 3) [2010] 1 CLJ 429 FC ***(foll)***

Vethanayagam v. Karuppiah & Ors [1968] 1 LNS 166 HC ***(refd)***

G **Legislation referred to:**

Federal Constitution, art. 10(1)(a)

Rules of the High Court 1980, O. 53 r. 1

Universities and University Colleges Act 1971, s. 15(5)(a)

H *For the plaintiffs - Malik Imtiaz Sarwar (Haris Ibrahim with him); M/s Kandiah Partnership*

For the 1st & 2nd defendants - Noor Hisham Ismail; SFC

For the 3rd defendant - Muhammad Shafee Abdullah (R Vasanthi & Sarah Abishegam with him); M/s Shafee & Co

I *Reported by Kumitha Abd Majid*

JUDGMENT

Aziah Ali J:

[1] The plaintiffs *vide* this originating summons sought the following orders (encl. 1):

(1) Deklarasi bahawa s. 15(5)(a) Akta Universiti dan Kolej Universiti 1971 (selepas ini dirujuk sebagai "AUKU") adalah bertentangan dengan Perlembagaan Persekutuan 1957, khususnya fasal 10(1)(a) dan adalah tidak sah;

(2) Deklarasi bahawa tindakan tatatertib yang dibawa oleh pihak defendan ketiga terhadap plaintif-plaintif atas tuduhan kesalahan berhubungkait sekatan di bawah s. 15(5)(a) AUKU adalah tidak berasas dan tidak sah di sisi undang-undang dan di bawah fasal 10(1)(a) Perlembagaan Persekutuan;

(3) Kos permohonan ini ditanggung oleh defendan-defendan; dan

(4) Lain-lain perintah yang difikirkan perlu atau sesuai oleh mahkamah yang mulia ini.

[2] Pending the disposal of encl. 1, the plaintiffs *vide* summons in chambers encl. 4 sought for an interim injunction on an undertaking as to damages as follows:

(a) Suatu injunksi interim dikeluarkan sementara menunggu pelupusan penuh tindakan plaintif-plaintif ini atau sehingga perintah lanjut oleh mahkamah yang mulia ini untuk menghalang defendan ketiga, pengkhidmatnya, ejen atau sesiapa yang lain daripada meneruskan dengan tindakan tatatertib yang di bawa terhadap plaintif-plaintif berdasarkan notis bertarikh 13 Mei 2010 atas tuduhan kesalahan berhubungkait sekatan di bawah s. 15(5)(a) AUKU.

Due to the urgent nature of the substantive application, the third defendant agreed not to proceed with the disciplinary action commenced against the plaintiffs pending the disposal of encl. 1. It was agreed that the application for an interim injunction made *vide* encl. 4 be disposed off together with the substantive application encl. 1.

[3] On 28 September 2010 I dismissed both encls. 1 and 4 with costs to the defendants to be taxed unless otherwise agreed. An appeal has been filed against my decision.

[4] Pursuant to my decision counsel for the plaintiffs made an oral application for the grant of an Erinford injunction pending appeal. The grounds relied on by the plaintiffs as special circumstances essentially are as follows:

(a) if the *status quo* is not preserved the appeal would be rendered nugatory/academic should the Court of Appeal decide that s. 15(5)(a) of the Act is unconstitutional;

(b) there is a reasonable prospect that the Court of Appeal may take a view that is different from the High Court on the issue of the constitutionality of s. 15(5)(a);

(c) the application is not frivolous;

(d) this case involves a novel point;

(e) greater hardship will be caused to the plaintiffs if an Erinford injunction is not granted;

(f) if an Erinford injunction is not granted it would have a great impact on the plaintiffs who are final year students and will be graduating in July 2011;

(g) the court has jurisdiction to grant an Erinford injunction under para. 1 of the Schedule to the Courts of Judicature Act 1964.

[5] The application was opposed by the defendants on the following grounds:

(a) that the substantive application is for declaratory orders;

(b) that upon making a decision on encl. 1, the court is *functus officio*;

(c) that there was no application for an interlocutory injunction and therefore the court is deprived of jurisdiction to entertain an application for an Erinford injunction.

Erinford Injunction

[6] Counsel for the third defendant submits that an injunction is not a cause of action but merely a relief and no injunctive relief is available pursuant to declaratory orders made since declaratory orders merely state the position in law. Counsel referred to PW Young 'Declaratory Orders' 2nd edn. at para. 2408 which reads as follows:

> The effect of a declaratory order is almost universally that the court merely authoritatively indicates that a certain interpretation has always been the true interpretation of an act or document, or alternatively, that an administrative decision etc has always been void. The effect of

> the court's order is not to create rights but merely to indicate what they have always been, ... Because of this, if an appeal is lodged against a declaratory order, conceptually there can be no stay of proceedings. Thus, if it is held that the decision of a licensing authority is void and accordingly the licenses is sued are null and void, there is no procedure whereby the court can validate those licences pending the hearing of an appeal.

Hence it is submitted that once the court has made its decision on the declarations sought for, the court is *functus officio*.

[7] I agree with counsel for the defendants that the issue of a stay does not arise where the relief sought for is a declaratory order. However I am of the view that the reason is due to the nature of a declaratory judgment as stated by PW Young referred to above rather than on the ground of *functus officio*.

[8] A declaratory judgment makes no positive order and cannot be enforced by execution. This has been clarified by Gopal Sri Ram FCJ in the Federal Court case of *Takako Sakao v. Ng Pek Yuen & Anor (No 3)* [2010] 1 CLJ 429 wherein His Lordship said *inter alia* as follows:

> The weakness of the remedy of declaration lies in the want of its enforceability. A declaration cannot be enforced by execution. In *Prakash Chand v. Grewal* [1975] Cri LJ 679, the court held as follows:
>
> > A declaratory decree cannot be executed as it only declares the rights of the decree-holder qua the judgement-debtor and does not, in terms, direct the judgement-debtor to do or to refrain from doing any particular act or things. Since there is no command issued to the judgement-debtor to obey, the civil process cannot be issued for the compliance of that mandate or command.
> >
> > In other words, there can be no committal or other execution process issued to enforce a declaration. Since a declaration cannot be enforced, no question of staying it may arise.

Following the abovementioned authority, a stay of a declaratory judgment does not arise.

[9] In the originating summons encl. 1 the plaintiffs did not apply for an injunction. The interim injunction was applied for *vide* summons in chambers encl. 4. In the case of *Marina Mohd Yusoff v. Pekeliling Triangle Sdn Bhd & Other Appeals* [2008] 1 CLJ 169 Sulaiman Daud JCA said *inter alia*:

> It is well settled that the court has jurisdiction on dismissal of an application for an interlocutory injunction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal ... known as an Erinford injunction ...

In the earlier case of *Vethanayagam v. Karuppiah & Ors* [1968] 1 LNS 166, Raja Azlan Shah J (as His Majesty then was) said *inter alia*:

> An order for a temporary injunction can be sought only in aid of a prospective order for a perpetual injunction. If, therefore, in the event of the plaintiff's success, he cannot obtain a decree for perpetual injunction, it is not competent for him to ask for a temporary injunction (see *Bishun Prashad v. Sashi Bhusan*, AIR [1923] Pat 133). In other words, a temporary injunction will not be granted in cases where a permanent injunction is not available under sections 52 to 54 of the Specific Relief (Malay States) Ordinance, 1950.

I agree with the defendants that since there was no application for an injunction made in the originating summons, the court has no jurisdiction to entertain an application for an Erinford injunction. Likewise the court has no jurisdiction to entertain the application for an interim injunction made *vide* encl. 4.

[10] Learned counsel for the plaintiffs relied on para. 1 of the Schedule to the Courts of Judicature Act 1964 as conferring jurisdiction on the court to grant the Erinford injunction based on the words "or any others" appearing in the said provision. Paragraph 1 of the said Schedule provides as follows:

> **Additional Powers Of High Court**
>
> **1. Prerogative writs.**
>
> Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[11] Paragraph 1 specifically states 'prerogative writs'. In interpreting the provisions of para. 1, the intention of the provision as a whole must be looked at. Where general words follow particular and specific words of one genus, the presumption is that the general words are restricted to the same genus as the preceding particular words unless it can be shown that a wider sense is intended. In the Federal Court case of *Merdeka University Berhad v. Government of Malaysia* [1982] 1 LNS 1, Seah J in his dissenting judgment had this to say on the general rule of construction of a provision where a particular class is stated followed by general words:

> It is a general rule of construction that where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as

referring to matters *ejusdem generis* with such class (per Pollock CB in *Lyndon v. Standbridge* [1857] 2 H & N 45, 51; 157 ER 19, 22). And in *Queen v. Edmundson* [1858] 28 LJMC 213, 215; 121 ER 30, 33 Lord Campbell CJ said:

> The general principle laid down in all the cases which have been cited is that, where particular words are followed by general words, the latter must be construed as *ejusdem generis* with the former.

The application of the *ejusdem generis* principle is also found in the judgment of Arifin Zakaria FCJ (now CJ Malaya) in the case of *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321.

[12] An Erinford injunction is not of the same genus as "*habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*" and the *ejusdem generis* principle does not apply. Hence I am unable to agree with counsel for the plaintiffs that Erinford injunction comes within the words "or any others" in para. 1. Paragraph 1 of the Schedule ought not to be interpreted as conferring jurisdiction on the court to grant an Erinford injunction.

[13] Further this action was commenced by way of originating summons. An application for any relief specified in para. 1 of the Schedule must be made under O. 53 of the Rules of the High Court 1980. Order 53 r. 1 provides as follows:

> **Order 53**
>
> **Application For Judicial Review**
>
> 1.(1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

In the present application I am of the opinion that reliance on para. 1 of the Schedule is misconceived.

[14] For the aforementioned reasons I dismissed the application for an Erinford injunction.

Costs

[15] Counsel for the plaintiffs raised the issue of costs in respect of encls. 1 and 4 which had been awarded to the respondents. It is submitted that the court had not heard parties on the issue of costs. It is true that the court did not hear submissions on costs. No submissions on costs were made at the conclusion of the hearing of encl. 1. Neither was a request to be heard on the issue of costs made

at the time judgment was delivered. Counsel for the plaintiffs submits that the court still has power to amend the order on costs as the order has not been perfected.

[16] In the case of *Petroliam Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew* [1986] 1 LNS 81, Hashim Yeop A Sani SCJ sets out the general principles governing costs as follows:

> The general principle envisaged in the rule is simply that costs follow the event and except when it appears to the Court that in the circumstances of the case some other order should be made. The same principle was enunciated in greater detail by Parker LJ in *Ottway v. Jones* [1955] 2 All ER 585, 591:
>
> > One starts with this, that, as a general principle, costs follow the event, and the successful party is entitled to be paid his costs unless there are special grounds to order otherwise, and those grounds, it is well settled, must be grounds connected with the cause of action. No doubt, also, where a plaintiff has wholly failed to establish his title or his right, it is impossible judicially to order the successful defendant to pay the plaintiffs costs. Indeed, as is shown by the cases to which my Lord has referred, it is there said that the occasion for the exercise of the discretion does not arise until the plaintiff has established his right.

[17] In respect of encls. 1 and 4, when considering the issue of costs, I did consider the grounds referred to by the plaintiffs' counsel that this is a public interest case involving a novel point and the plaintiffs are students. However I am of the view that these grounds are insufficient to constitute special grounds for me to depart from the general principle that the successful party is entitled to be paid his costs. Therefore I exercised my discretion and ordered costs to the defendants to be taxed unless otherwise agreed. In respect of the present application, for the same reason, costs is awarded to the defendants to be taxed unless otherwise agreed.

[18] Counsel for the plaintiffs submits that since the order has not been perfected, the court can still review the order on costs. Counsel for the third defendant pointed out that judgment had been written and therefore the court cannot alter the judgment. In fact parties had been supplied with the written grounds of judgment. In the circumstances I agree with counsel for the third defendant that I have no power to reconsider and amend my order on costs. Further I am of the opinion that insofar as encls. 1 and 4 are concerned I am *functus officio*. The order on costs in respect of encls. 1 and 4 is maintained.